Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RONALD GULLA and EVELYN GULLA
Petitioners,

v.

NORTH STRABANE TOWNSHIP; NORMA WINTERMYER, individually and in her capacity as North Strabane Township Supervisor; ALAN A. AXELSON, M.D.; LINDENCREEK ASSOCIATES; T.A. WARD CONSTRUCTORS; and ADVANCED BUILDING DEVLOPMENT
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED FOR REVIEW

I. **Whether this Court should grant certiorari because the lower court erred in granting summary judgment in favor of the municipal defendants where there was evidence that the subdivision which resulted in the destruction of the easement had been heard and passed without notice to the plaintiffs and was therefore a violation of procedural due process?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated May 15, 2001, was not reported and appears at Appendix p. 1A. The trial court's Memorandum in the United States District Court for the Western District of Pennsylvania granting Defendants' Summary Judgment, dated May 12, 2000, was not reported and appears at Appendix p.46. The lower court's Memorandum granting Defendant's Motions to Dismiss, dated February 10, 1999 was not reported and appears at p. 28.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered May 15, 2001. Rehearing was requested but was denied on June 20, 2001 Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners filed suit against the Respondents under the provisions of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioners claimed violations of the Fifth and Fourteenth Amendments to the United States Constitution:

> Article V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Article XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In relevant part, the Pennsylvania Statute complained of provides:

> §10508 Approval of plats
>
> All applications for approval of a plat (other than those governed by Article VII), whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land development ordinance .....

STATEMENT OF THE CASE

The complaint in this matter essentially alleges that North Strabane Township and Supervisor Wintermyer violated the civil rights of Plaintiffs Ronald Gulla and Evelyn Gulla through the approval of a subdivision resulting in the destruction of a spring providing water to the plaintiffs' property and the destruction of the right of way to and from the spring. It was alleged that this was done for an improper reason and without due process. It was alleged that private defendants, including the developer of the subdivision, Dr. Axelson with his development company, Lindencreek Associates, and the construction companies, T.A. Ward and Advanced Building Development who performed the work destroying the spring and right of way, acted in concert with the governmental defendants.

The case was assigned to the Honorable Gary L. Lancaster, Western District of Pennsylvania. Judge Lancaster originally dismissed the action on the basis of the Rooker-Feldman doctrine. An appeal was taken to the Third Circuit which reversed the dismissal in Gulla v. North Strabane Township, 146 F.3d 168 (3d Cir. 1998) and remanded the matter to the district court.

By Order, dated February 10, 1999, the Judge Lancaster dismissed the action as it pertained to Plaintiff Ronald Gulla based upon standing, and dismissed the claims against Defendants Axelson, Lindencreek, T.A. Ward and Advanced Building on an alleged failure to demonstrate their actions were under color of law. By Order, dated May 12, 2000, the lower court granted summary judgment in favor of the remaining municipal defendants on the ground that no due process violation was demonstrated. The two Orders and accompanying Memoranda are attached.

STATEMENT OF FACTS

Plaintiffs are the owners of a certain parcel of land located within North Strabane Township, directly adjacent to a proposed subdivision submitted by Defendant Lindencreek Associates.

On or about April 23, 1993, Lindencreek Associates submitted an application to the Planning Commission for subdivision approval. The application purported to seek both preliminary approval and final approval for recording. App. 22a.[1]

No notice was ever given to the Gullas concerning the subdivision process. No notice was given despite the fact that the Gullas had complained to representatives of Lindencreek that their spring water right-of-way had been interfered with on the land which now appeared to be included in the subdivision proposal. Further, no public notice regarding the subdivision was ever published as well.

On or about July 15, 1994, a representative of Lindencreek contacted the Gullas' counsel to warn of anticipated interference with their spring water right-of-way. This was the first notice to the Gullas of any subdivision approval. Subsequently, the Gullas obtained a copy of the subdivision plan from the Township. which showed the recorded Gullas' spring and right-of-way was to be asphalted over with a road and/or other improvements. App. 23a.

The Board of Supervisors for North Strabane Township had approved the Lindencreek subdivision by a vote of 3-0 on June 28, 1994. App. 24a. Defendant Norma Wintermyer, a member of the Board, voted in favor of granting the subdivision. Since that time Defendant Wintermyer, apparently acting on behalf of realtor Remax, has advertised and promoted the sale of the real estate lots in the subdivision plan. She received a direct profit from commissions, and had solicited Dr Axelson who controlled Lindencreek, in writing for the exclusive right to market the Lindencreek lots, several months before her vote approving the subdivision. App. 367a.

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[1]Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

On or about July 28, 1994 contractors T.S. Ward Constructors and Advanced Building Development began excavation operations pursuant to the subdivision plan approval which totally destroyed and buried the Gulla spring. Additionally, the right of way established by means of a pipeline leading to the Gulla property was also destroyed. This resulted in the termination of the sole water supply to the Gulla residence. Despite demand, Defendants have refused to restore the spring and water line.

The destruction of the Gulla spring and waterway is the culmination of series of malicious acts aimed at the Gulla family. This history includes the following:

a. Defendant Axelson through companies he owned and/or controlled procured the land for development from farmland controlled by the Gulla family. Defendant Axelson through companies he owned and/or controlled procured the land over the objection of Plaintiff Ronald Gulla who had an approved loan and had offered to pay a higher price for the ground.

b. Near the time of the scheduled audit of the Estate of Anna Gulla, No. 63-75-958 to review objections to the above-mentioned estate proceedings, Defendant Axelson, a psychiatrist, initiated proceedings for the involuntary commitment of Joseph Gulla (husband of Plaintiff Evelyn Gulla and father of Plaintiff Ronald Gulla) to a mental institution requiring extensive proceedings to end the commitment.

c. Defendant Axelson also initiated criminal charges against Joseph Gulla which were eventually non-prossed by the District Attorney of Washington County.

Defendants Axelson and Lindencreek had specific knowledge regarding the Gulla's spring and pipeline right of way. In approximately December 1993, preliminary excavation work broke the water line. The intervention of counsel forced a repair of the same. It is noted that the repair was inadequate in that old and used pipes were utilized as replacements which served to begin to taint the water.

Based upon these facts, the Complaint alleged civil rights violations against all the defendants. Defendants North Strabane Township and Norma Wintermyer, as a public official, acted under color of state law in approving the subdivision plan through the procedures of the municipal corporation. Defendants Axelson and Lindencreek have acted in concert with and/or in agreement with the North Strabane Township officials regarding the subdivision process and the ultimate marketing of the lots in the subdivision. The Defendant contractors, T.A. Ward Constructors and Advance Building Development acted under the instruction and direction of Defendants Axelson and Lindencreek, and in accord with the plan approved by the municipal defendant.

The Complaint alleges that as a result of the aforementioned conduct, which was done knowingly, intentionally, maliciously, recklessly, or alternatively, negligently, defendants have violated the civil rights of the plaintiffs as follows:

a. Adversely affected plaintiffs, property rights without due process of law in violation of the Due Process Clause of the United States Constitution:

1) Approved a plan destroying personal property rights without notice.

2) Approved a plan pursuant to a procedure tainted with conflict of interest and/or lack of neutrality.

b. Arbitrarily, capriciously, without a rational basis, and/or with a wrongful motive for personal profit not related to legitimate governmental objectives, authorized the destruction of plaintiffs, property rights contrary to the Due Process Clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari because Pennsylvania procedures now permit the approval of the destruction of property protected by recorded easements without notice and without standing to challenge the procedures in Pennsylvania Courts.

Defendants argued that they were entitled to summary judgment regarding Evelyn Gulla's §1983 claim of violation of her due process rights when during the course of a public meeting or hearing, the supervisors approved a plan whereby a roadway was permitted to be constructed over top of her spring and water easement. She had received no notice of this procedure, even though her easement rights were duly recorded on the public record.

In ruling on Defendants' initial motion to dismiss, the lower Court held that some form of notice would be required as a matter of Pennsylvania statutory law if a public hearing was held. Based upon the pleadings, the Court apparently viewed the public procedure regarding the subdivision approval process to constitute such a public hearing. 53 Pa.S. §10508.

The Township has taken the position that a vote concerning the subdivision occurred during a public meeting. They argue that this was not a public hearing, since a public hearing would require a special notice. According to Moyar, the notice for public hearing or special meeting would require the following information:

Q. All right. What information is contained in the public hearing notice?

A. The reason for the hearing, and the date, time and place, and generally it's concluded with any property owner within 300 feet -- or no, wait. That's the zoning board. Anyone interested -- Generally it's anyone interested regarding this application is welcome to attend the hearing.

Q. And now, when you say the reason for the hearing, it would give some specific notice as to the subject matter of what's going to be discussed?

A. Yes. Usually when I place it, the very first thing is the applicant's name, address, and the reason for the hearing; whether it -- for whatever reason.

Deposition of Paulette Moyar, pp. 16,17, App. 357a,368a.

Moyar admitted that this type of notice was not used concerning the Lindencreek Subdivision at issue. The notice in this case did not even indicate that the subdivision approval would be considered. In fact, the notice was published in January and simply consisted of a list of the days (3rd and 4th Tuesdays of the month) that the supervisors would be meeting during course of the year. This notice would not in any way alert any interested party that their property rights could be affected and would do no more that list the anticipated dates of the supervisor's meetings for the upcoming year. As noted in Moyar Ex. 2, the only published notice of the North Strabane Township public meetings is in the following form, published on January 19, 1994:

PUBLIC MEETINGS NOTICE
NORTH STRABANE TOWNSHIP
PLANNING COMMISSION

Notice is hereby given that the North Strabane Township Planning Commission will hold a non-legislative meeting on the third Tuesday of each month and will conduct a regular legislative meeting on the fourth Tuesday of each month during calendar year 1994. No formal business is transacted at the non-legislative meetings., All meetings will begin at 7:00 P.M., and are held at the Municipal Building, R.D. #1, Box 132, Route 519 South, Canonsburg Pa.
Frank R. Siffrinn
Manager/Secretary

App. 354a.

The defendants also suggest that the state courts have already ruled that Evelyn Gulla lacks standing to participate in the subdivision process. Of course, this is the very reason why this matter has been permitted to proceed in the federal court. As noted by the Third Circuit panel when this matter was remanded to the lower Court for further consideration:

> In this case, we conclude that the Gullas are not precluded from bringing their federal claims because the state court could not and did not adjudicate the merits of their constitutional claims. Rather, the state court noted that the Gullas lacked standing to raise their constitutional claims in an appeal of the Board's subdivision decision. Since the Gullas could not obtain an adjudication of their claims in state court, they are not precluded from raising their constitutional claims in the federal forum. (citations omitted) Opinion, p. 9.

The federal due process challenge grows out of the approval of the destruction of Mrs. Gulla's water rights without notice and without the ability to participate in the underlying proceeding. This federal due process challenge is powerful precisely because the state courts have utterly barred the door to any participation whatsoever in the proceeding despite the fact that it dealt directly with the Gulla's spring easement. (It is interesting to note that the state Supreme Court ruling in this matter was a 3-3 tie resulting in affirmance, and hence while binding upon the Gulla's is not yet definitive regarding the ultimate course of Pennsylvania law.)

It is well established as a matter of federal due process law that persons involved in civil litigation are entitled to the procedural due process of law. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Gibson v. Berryhill, 411 U.S. 564 (1973). This right can be vindicated in a §1983 action. Gibson, supra. A federal case outlining this basic requirement of due process law on facts analogous to those presented here is Harris v. County of Riverside, 904 F.2d 497 (9th Cir. 1990). In that case, the 9th Circuit required individual notice to be given to affected owners prior to a municipal vote concerning rezoning. The court specifically held that such rezoning so clearly affected individual rights that a general public notice would be insufficient to satisfy due process requirements.

It is to be noted that in this case the township has admitted that they did not even provide general public notice on the question of the Lindencreek Subdivision. The notice of January 1994 merely alerted the public that supervisor meetings would be held on the third tuesday's of each month. On this record, no notice of any kind was given that the Lindencreek Subdivision would be voted on June 28, 1994. Under constitutional law analysis, this would constitute a procedural due process violation. This Court is requested to make a strong ruling for the benefit of the public so that citizens affected by subdivision rulings would be given at least an opportunity to attend the meeting and explain their concerns to presumably neutral and open-minded supervisors who will then act

fairly, hence ameliorating the need for expensive and protracted litigation.

The lower court found that the Township did not actually deprive the plaintiff of her spring and therefore did not implicate her property rights. However, in approving the plan, creating a road over top her spring, and requiring, as a matter of law, that the developer strictly follow the approved plan, the township adversely affected her recorded ownership rights to the spring easement. This Circuit has ruled that this ownership interest is sufficient to mandate due process protection. As noted in DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 600-601 (3d Cir. 1995):

> We think it consistent with Bello to conclude that ownership is a property interest worthy of substantive due process protection.... Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of a land use regulation, that is, in situations where the government decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection. (footnotes and citations omitted)

Clearly, here, the approval of a road over her spring "impinged" upon the use and enjoyment of the property.

Further, the lower court found that the failure to provide notice, even if there existed a property right, was not constitutionally mandated. Not only was this contrary to the law of the case established in the court's initial ruling on the motion to dismiss, but it also constitutes an error of law.

As summarized in Harris v. County of Riverside, 904 F.2d 497, 503 (9th Cir. 1990):

> Once it is determined that due process applies, the question remains what process is due.... An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections... The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner...

As noted in the earlier portion of this Petition, North Strabane Township has adopted a policy which virtually assures that no affected property owner will realize that their property is subject to subdivision action. At the beginning of the year, a list of the public meetings is published one time. Of course, there is no agenda or subject matter published. There is not even notice printed that there will be an upcoming meeting during the course of the year. It would be difficult to craft a more inadequate notice procedure, virtually assuring that developers and Township officials planning to market subdivision lots, could operate in near total secrecy.

Finally, the lower court opined that the appellate process afforded the plaintiff a full and fair opportunity to be heard regarding any irregularities in the procedures and policies implicate on land use matters and that the plaintiff had in fact pursued these procedures. (Opinion, p. 7) However, as noted in the first successful appeal to the circuit, the state court ruled that the plaintiff's lacked standing to pursue the procedures. See Gulla v. North Strabane Township, 676 A.2d 709 (Pa.Cmwlth.1996) affirmed by an equally divided Pennsylvania Supreme Court at 712 A.2d 281 (Pa. 1998). As a matter of law, the state appeal

procedures cannot be utilized by the plaintiff. This is the essence of the due process violations. An arbitrary government decision impinged upon the plaintiff's rights without notice and without any state recognized right to participate meaningfully in the proceeding prior to the actual deprivation of the right. Further, this all occurred with a voting member of the Township Supervisors soliciting the developer to sell the lots before the vote and then earning commissions on the sale of the lots after the vote.

It appears that the underlying facts are not here in controversy, accordingly, not only should the defendants' motion for summary judgment have been denied, but rather the lower Court erred when it did not grant summary judgment to the plaintiff on the issue of the denial of her procedural due process rights.

Fundamental due process concerns are implicated by this extensive litigation struggle in the lower courts. Many local townships approve plans that directly affect the recorded easement rights of adjacent property owners with no notice whatever. The procedure in Pennsylvania does not even require a public notice of any type that such issues are under consideration at any given public meeting. There is not even given the most minimum consideration. Currently, there is only a published Pennsylvania Supreme Court decision on the issue which reflects a 3-3 vote deadlock, leaving this important Constitutional question completely unclear.

This Court is urged to utilize its discretionary power to grant certiorari so that this existing legal anomaly can be clarified, the rights of countless citizens be protected and ultimately head-off numerous potential lawsuits by affected landowners which otherwise could have been avoided through proper discussion after notice at a local public meeting.

The memorandum of the appellate court essentially determined that the alleged misdeeds of the municipal defendants

acting in conspiracy with the developer did not cause harm to the plaintiffs. However, this would normally be considered an issue for the jury since the trespass and concomitant destruction of the spring would not have gone forward until the subdivision plan was approved. As a matter of policy, this court is urged not to overlook the established corrupt activity of the municipal defendant when the issue arguably should be submitted to the jury.

In any event, the plaintiffs have requested declaratory relief establishing their rights together with a court order permitting them to reestablish their spring. See Complaint, paragraphs 21(f) and (g), App. p. 18a. Under these circumstances, the causation issue, even if not viewed as a jury question, does not prevent the case from going forward.

This case presents a procedural due process question of exceptional importance. Defendant North Strabane Township, as a matter of policy, gives absolutely no notice to adjacent landowners and/or the public at large concerning the public meeting when the subdivision is to be considered. In cases such as the one presented here, easement holders can have their easements impinged without any opportunity to participate in the subdivision proceeding. Had the Gullas been permitted to participate, they would have had an opportunity to protect their easement prior to deprivation. At a minimum, the municipal solicitor would have been able to request specific indemnification from the developer had he continued to insist on a construction plan which included the paving of a road over top the established spring.

The Pennsylvania Supreme Court upon addressing this issue, issued a ruling that was split 3-3. Gulla v. North Strabane Township, 676 A.2d 709 (Pa.Cmwlth.1996), aff'd by equally divided court, 712 A.2d 281 (Pa.1998). Accordingly, the status of Pennsylvania law is completely unclear. Citizens of the Commonwealth would be greatly served by a clarification of the notice issue by an authoritative federal court opinion.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

September 12, 2001

Mr. Peter M. Suwak
Pete's Surplus Building
PO Box I
Washington, DC 15301

Re: Ronald Gulla and Evelyn Gulla
v. North Strabane Township, et al.
Application No. OIA227

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on September 12, 2001, extended the time to and including November 17, 2001.
This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/ Clayton R. Higgins, Jr.
Assistant Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1877

Gulla

vs.

North Strabane Township

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA,
NYGAARD, ALITO, ROTH, MCKEE, RENDELL
BARRY, AMBRO, FUENTES and ROSENN,* Circuit
Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann

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*Senior Circuit Judge Rosenn voted only as to panel rehearing.

Nov 26 1999

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1877

RONALD GULLA; EVELYN GULLA

Appellants

v.

NORTH STRABANE TOWNSHIP; NORMA WINTERMYER, individually and in her capacity as North Strabane Township Supervisor; ALAN A. AXELSON, M.D.; LINDENCREEK ASSOCIATES; T.A. WARD CONSTRUCTORS; ADVANCED BUILDING DEVELOPMENT

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 96-cv-01232)
District Judge: Honorable Gary L. Lancaster

Argued
May 1, 2001

Before: MANSMANN, NYGAARD and ROSENN,
Circuit Judges.

(Filed May 15, 2001)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Evelyn and Ronald Gulla, mother and son, appeal from an order of the District Court dismissing Ronald Gulla's federal civil rights claims pursuant to Fed. R. Civ. P. 12(b)(1) for lack of standing, and dismissing Evelyn Gulla's section 1983 claims against defendants Axelson, Lindencreek Associates, T. A. Ward Constructors, and Advanced Building Development because none of these defendants acted under color of state law. Evelyn Gulla also appeals from an order of the District Court granting summary judgment in favor of North Strabane Township and Norma Wintermyer with respect to claims alleging violations of Evelyn Gulla's procedural and substantive due process rights. The Gullas contend that the District Court erred in: 1) finding that Ronald Gulla lacked standing to pursue his federal claims; 2) dismissing federal claims against the private defendants based on lack of state action; 3) granting summary judgment in favor of the Township and Wintermyer on Evelyn Gulla's procedural due process claim, and, 4) granting summary judgment in favor of the municipal defendants on Evelyn Gulla's substantive due process claim.

Because we are convinced that each of these allegations of error lacks merit, we will affirm the orders of the District Court.

I.

The parties are familiar with the facts underlying this protracted property dispute. Accordingly, we recount the procedural history of this matter, referring to the facts only in order to provide context for our legal analysis.

On June 28, 1996, Ronald and Evelyn Gulla filed a civil rights action pursuant to 42 U.S.C. § 1983, alleging that North Strabane Township and Township Supervisor Norma Wintermyer violated their civil rights by approving a subdivision plan which interfered with their easement rights in a spring located on the subdivided property. The complaint also alleged that private defendants, Alan Axelson, Lindencreek Associates, T. A. Ward Constructors, and Advanced Building Development were liable under section 1983 for interference with the Gullas' rights in the spring because they acted in concert and conspiracy with the municipal defendants in carrying out the subdivision plans.

On April 24, 1997, the District Court granted motions to dismiss filed by each of the defendants based on the Rooker-Feldman doctrine. Under this doctrine, a District Court cannot consider constitutional claims which have been adjudicated in a state court or are

inextricably intertwined with a state court adjudication.[1] The Gullas appealed from this order of dismissal. We

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[1] The District Court invoked the Rooker-Feldman doctrine based on decisions rendered by Pennsylvania state courts. In 1994, following the Board of Supervisors' approval of the subdivision plan, the Gullas appealed the approval to the Court of Common Pleas of Washington County. The Gullas alleged that the actions and policies of the Township violated their federal and state constitutional rights and that the decision approving subdivision was invalid, arbitrary, and contrary to law. The Court of Common Pleas held that under Pennsylvania law the Gullas lacked standing to object to the subdivision approval because their claim was based solely on a private right as established by deed. The Court of Common Pleas also failed to find merit in the Gullas' allegations of impropriety in the approval process.

The Gullas then appealed to the Commonwealth Court of Pennsylvania, which wrote:

> An application for a subdivision plan which conforms to all the technical requirements of relevant ordinances cannot be denied based on deed restrictions. Thus, we hold that the trial court correctly found that the Gullas did not have standing to appeal the subdivision approval process.

Gulla v. North Strabane Township, 676 A.2d 709, 711 (Pa. Commw. Ct. 1996). The Commonwealth Court also found that, "Even if the Gullas did have standing, their claim that the Township did not follow the two-step process regarding major subdivision ... is also without merit." Id. The Supreme Court granted the Gullas' allocatur petition and affirmed, by an evenly divided court, the decision of the Commonwealth Court. See Gulla v. North Strabane Township, 712 A2d. 281 (Pa. 1998).

reversed the order of the District Court, holding that the Rooker-Feldman doctrine did not apply to prevent our consideration of the Gullas' constitutional claims:

> The essence of the Court of Common Pleas' opinion is that, under Pennsylvania law, the Gullas lack standing to challenge the subdivision process. Since the Gullas' standing to bring their federal claims is solely a matter of federal law, the district court clearly could consider the Gullas' due process, equal protection, and Fifth Amendment taking claims without disturbing the state court's conclusion.

Gulla v. North Strabane Township, 146 F.3d 168, 172 (3d Cir. 1998). "Since the Gullas could not obtain an adjudication of their claims in state court, they are not precluded from raising their constitutional claims in the federal forum." Id. at 173.

On remand the District Court, in an order dated February 10, 1999, dismissed all claims brought by Ronald Gulla against all defendants for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1): "Ronald Gulla cannot meet his burden of establishing an injury in fact - he has no legally protectable interest in the spring. The deed's language clearly indicates that the right in the spring is personal to Evelyn and Joseph Gulla, as it terminates when they cease to own the parcel of land." Gulla v. North Strabane Township, No. 96-1232, mem. op. at 8 (February 10, 1999). The District

Court also granted the developer's and contractors' motions filed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss Evelyn Gulla's section 1983 claims because "the complaint fail[ed] to allege sufficient facts to support even an inference that they acted under color of state law." Id. at 9. Evelyn Gulla's section 1983 due process claims against North Strabane Township and Wintermyer were the only claims to survive the defendants' motions to dismiss. The District Court declined to exercise supplemental jurisdiction over any of Evelyn Gulla's state law claims, dismissing those claims without prejudice.[2]

In an order dated May 12, 2000, the District Court granted summary judgment in favor of North Strabane Township and Non-Norma Wintermyer on each of Evelyn Gulla's section 1983 due process claims. With respect to due process claims lodged against the Township, the District Court held that the Township's approval of the subdivision plan did not destroy Evelyn Gulla's property: "The Township did not destroy the spring, the developer destroyed the spring." See Gulla v. North Strabane Township, No. 96-1232, mem. op. at 4 (May 12, 2000). The Court then found that even if the Township had deprived Evelyn Gulla of a property right, it did not violate her due process rights in doing so. "Even if the state deprives one of property, which it has

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[2]This February 10, 1999 order was revised in an order dated March 19, 1999. The purpose of this revised order was to clarify that all section 1983 claims against non- governmental defendants had been dismissed.

not done in this case, a plaintiff fails to state a constitutional claim if the state affords an adequate post-deprivation remedy." Id. at 6. Because the District Court found that Pennsylvania law provides a mechanism for challenging alleged irregularities in the procedures and policies governing land use polices, and that Evelyn Gulla had taken advantage of that mechanism, the District Court found that Gulla had failed to state a procedural due process claim under section 1983.

The District Court did not discuss the substantive due process claim made against the municipal defendants, but granted summary judgment in favor of the defendants on this claim as well.

This timely appeal followed.

II.

We address the Gullas' allegations of error seriatim, turning first to their claim that the District Court erred in dismissing Ronald Gulla's claims based on its finding that he lacked standing to pursue these claims.

Article III of the Constitution confers jurisdiction in the federal courts over "cases" and "controversies." One element of the case or controversy requirement is that the plaintiff bears the burden of establishing that he has standing to sue. "The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit." Raines v. Byrd, 521 U.S. 811, 818 (1997). In every case where the jurisdiction of a federal court is invoked,

the plaintiff must be able to demonstrate "an invasion of a judicially cognizable interest." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Defendants Lindencreek and Axelson contended in motions to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), that Ronald Gulla lacked any property interest protected by section 1983, and that, as a result, the District Court lacked jurisdiction to consider his federal claims. Specifically, the defendants argued that Ronald Gulla did not have any legal interest in the spring located on the subdivided property and, therefore, he lacked standing to pursue claims based on interference with that spring.

We have described the inquiry to be undertaken by the District Court in evaluating a Rule 12(b)(1) attack on the existence of subject matter jurisdiction as follows:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits ofjurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Mortensen v. First Fed. Savings and Loan Assn., 549 F.2d 884, 891 (3d Cir. 1977). We review a District Court's finding of jurisdictional facts for clear error. See Carpet Group International v. Oriental Rug Importers Assn., Inc., 227 F.3d 62, 69 (3d Cir. 2000).

In finding that Ronald Gulla lacked standing to pursue his federal claims, the District Court evaluated his property interest in the spring against the language of the deed granting his parents, Joseph and Evelyn Gulla, rights in the spring. We, too, have examined the record as it relates to Ronald Gulla's alleged property rights, paying particular attention to the terms of the deed granting Joseph and Evelyn Gulla rights in the spring located on the subdivided property. We have also considered Ronald Gulla's claim that he has an interest in the spring based on an implied easement, an unrecorded deed introduced in state tort proceedings, or his "present reversionary interest" in property adversely affected by destruction of the spring. Our review of the record and controlling legal authority convinces us the District Court did not commit clear error when it concluded that Ronald Gulla failed to "meet his burden of establishing an injury in fact. . . . The deed's language clearly indicates that the rights in the spring [were] personal to Evelyn and Joseph Gulla. . . ." Gulla v. North Strabane Township, mem. op. at 8 (Feb. 10, 1999).

Ronald Gulla's claims against each of the defendants were properly dismissed for lack of subject matter jurisdiction.

III.

We turn next to Evelyn Gulla's contention that the District Court erred in dismissing her section 1983 claims against defendants Axelson, Lindencreek, T.A. Ward, and Advanced Building Development based on a finding that these defendants did not act under color of state law.

It is well established that a plaintiff in an action brought pursuant to 42 U.S.C. § 1983 must demonstrate that a defendant acted to deprive the plaintiff of a right secured by the Constitution and laws of the United States and that the deprivation took place under color of state law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 145 (1970). The complaint filed here alleges the following with respect to the private defendants:

> Defendants Axelson and Lindencreek have acted in concert with and/or in agreement with the North Strabane Township Officials regarding the subdivision process and the ultimate marketing of the lots in the subdivision. Defendant contractors are acting under the instructions and direction of Defendants Axelson and Lindencreek, and in accord with the plan approved by the municipal defendant.

Our precedent establishes that in order to state a claim against a private entity for a violation of section 1983, a plaintiff "must point to some action that is 'fairly attributable' to the state." Angelico v. Lehigh Valley Hospital, Inc., 184 F.3d 268, 276 (3d Cir. 1999). (quoting Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982)). "A person may be found to be a state actor

when (1) he is a state official; (2) 'he has acted together with or has obtained significant aid from state officials;' or (3) his conduct is, by its nature, chargeable to the state." Id. (citations omitted).

We agree with the District Court that the allegations made against these private defendants do not support an inference of state action sufficient to withstand a motion to dismiss. The District Court properly analyzed each of these allegations:

> [The complaint as a whole] fails to meet the pleading requirements of Rule 8(a)(2) as to [Gulla's] section 1983 claims against the developer and contractor defendants. [Gulla] fails to allege facts to demonstrate that defendants Axelson and Lindencreek did anything more than invoke the township's subdivision approval process. Merely invoking state procedures, such as applying for approval of a subdivision, does not establish an inter-relation with the government sufficient to cloak one as acting under color of law. Moreover, [Gulla] fails to allege that defendants T.A. Ward and [Advanced Building Development] were involved in the subdivision approval process in any way.

Gulla v. North Strabane Township, mem. op. at 10-11 (Feb. 10, 1999) (citations omitted). The District Court, therefore, did not err in dismissing Evelyn Gulla's claim against the private defendants for failure to allege state actions.

IV.

Evelyn Gulla next contends that the District Court erred in granting summary judgment in favor of North Strabane Township and Norma Wintermyer with respect to Gulla's procedural due process claim. She claims that "no notice of any kind was given that the Lindencreek Subdivision would be voted on June 28, 1994."

We agree that the District- Court's grant of summary judgment on this claim was appropriate. In order to survive a motion for summary judgment on her procedural due process claim, Gulla was required to show that the action taken, without formal notice, at the June 28, 1994 hearing caused the deprivation of her water rights in the subdivided property. We have reviewed the record in detail and are convinced that the requisite causal connection is lacking. No reasonable juror could conclude that the spring was not destroyed prior to the subdivision approval.

The record establishes that preliminary approval of the disputed subdivision was granted in May 1993, and that physical destruction of the spring occurred at or near that time when initial development testing took place. Gulla testified in her deposition that she became aware that development might interfere with the spring in 1993 "when big machines went over the water line." Gulla consulted an attorney at that time who complained to Axelson, presenting him with the easement deed and grant number. Allegedly inadequate repairs were made to the line rendering the water undrinkable, and a second interruption of water flow occurred in April 1994. The attorney who represented Gulla during that period

testified in his deposition that there was a destruction of water from the spring by the end of 1993.

There is no doubt that prior to the June 28, 1994 final approval of the subdivision Evelyn Gulla knew both that a subdivision was contemplated and that there had been significant interference with her easement. Had Gulla wished to participate in the Township's final consideration of the subdivision plan, she or her attorney, armed with information they already had, could have inquired as to when the subdivision would be voted upon; the Township published a schedule of both its legislative and non- legislative meeting dates and Gulla does not deny that she was aware of these dates.

Even had Gulla received the formal notice to which she claims she was entitled and had appeared at the meeting to assert interference with her private easement, her legal position would not have been altered. Her water rights in the subdivided property were destroyed prior to the July 1994 hearing and the Township, under Pennsylvania law, was precluded from considering her easement rights even had she asserted them at the hearing. As the state court opinions make clear, the Township was not permitted to take into account the private rights of individuals in arriving at a determination of whether to grace subdivision approval. Gulla v. North Strabane Township, 676 A.2d 709 (Pa. Cmwlth. 1996). Protection of these private rights may be secured through a contract or tort action against the person abrogating the easement.[3]

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[3]The record indicates and Gulla's attorney confirmed at oral

Because there was no causal connection between procedural defects alleged in connection with the subdivision approval process and any impairment of Evelyn Gulla's water rights, the District Court did not err in granting summary judgment in favor of the municipal defendants on her due process claim.[4]

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argument that Gulla is pursuing these state claims.

[4]In granting summary judgment in favor of the municipal defendants, the District Court, too, cited Gulla's failure to establish that approval of the subdivision caused the damage to her water rights. The District Court however concluded that even if the municipal defendants had, arguendo, interfered with Gulla's rights, that interference did not amount to a due process violation because Pennsylvania provided an adequate post- deprivation remedy. According to the District Court, the Gullas had availed themselves of that remedy and, therefore, could not state a due process claim under section 1983. Although this latter portion of the District Court's ruling was dicta, we think that it is important to clarify that we disagree with the District Court's analysis of the Pennsylvania proceedings.

While it is true that Pennsylvania has in place an appeal process governing challenges to zoning and subdivision decisions, that process does not encompass claims based on the sort of private right asserted by Gulla. The adequacy of these procedures is, therefore, irrelevant to the analysis of the constitutional issues before us. As we noted in our opinion in Gulla v. North Strabane Township, 146 F.3d at 172, the Pennsylvania state courts held that they could not reach the merits of Gulla's claims because she lacked standing to raise them. In light of this holding, we cannot agree with the District Court's statement that: "The fact that the state courts ruled against plaintiff does not mean she lacked standing to raise them. In light of this holding, we cannot agree with the District Court's statement that: "The fact that the state courts ruled against plaintiff does not mean she was denied

V.

We turn now to Gulla's substantive due process claims against the municipal defendants. This claim is based on allegations that the Township's approval of the disputed subdivision was tainted when Norma Wintermyer voted in favor of the plan based on personal reasons unrelated to the merits of the subdivision proposal.

In reviewing the District Court's grant of summary judgment with respect to this claim, we note that the District Court did not explain the reasoning underlying its decision. "When a district court has failed to reach a question below that becomes critical when reviewed on appeal, an appellate court may sometimes resolve the issue. . . rather than remand ..... Monitors Medical Group Participating Savings Plan v. Bugler, 243 F.3d 773, 786 at n.12 (quoting Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 1511159 (3d Cir. 1998)). Our review of the District Court's grant of summary judgment is plenary. "[W]hether a genuine issue of material fact exists presents a purely legal question that does not require or allow a district court to exercise discretion." Id. Accordingly, there is no necessity for remand, and we may consider whether the evidence supports the grant of summary judgment.

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procedural due process; it simply means the plaintiff lost the case." Gulla v. North Strabane Township, mem. op. at 7 (May 12, 2000). The plaintiff did not "lose" her case in state court; she lacked standing to raise her constitutional claims in that forum, making consideration of those claims in the federal courts particularly important.

Evelyn Gulla's substantive due process claim also fails for lack of evidence of causation. Although Gulla has raised the specter of impropriety in connection with Wintermyer's vote in favor of subdivision approval, the record is devoid of any evidence connecting that vote to any damage done to Gulla's water rights. In order to survive a motion for summary judgment, Gulla was required to demonstrate that Wintermyer's vote proximately caused her injuries. See Brower v. County of Inyo, 489 U.S. 593, 599 (1989). She failed to make the required showing. As we have explained, the record establishes that the spring on the subdivided property was destroyed well before the subdivision approval and before Wintermyer engaged in the allegedly culpable conduct or cast her vote.

Given that the record fails to support any causal connection between Wintermyer's vote and alleged interference with Gulla's easement, Gulla's substantive due process claim fails; the grant of summary judgment in favor of the municipal defendants was appropriate.

VI

Because we are convinced that the District Court did not err in granting the motions disposing of all claims raised in this matter, we will affirm the Orders of the District Court.

To the Clerk:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1877

RONALD GULLA; EVELYN GULLA

Appellants

v.

NORTH STRABANE TOWNSHIP; NORMA WINTERMYER, individually and in her capacity as North Strabane Township Supervisor; ALAN A. AXELSON, M.D.; LINDENCREEK ASSOCIATES; T.A. WARD CONSTRUCTORS; ADVANCED BUILDING DEVELOPMENT

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 96-cv-01232)
District Judge: Honorable Gary L. Lancaster

Argued
May 1, 2001
Before: MANSMANN, NYGAARD and ROSENN,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Pennsylvania and was argued on May 1, 2001.

On consideration whereof, it-is now here ordered and adjudged by this court that the judgments of the District Court entered on February 10, 1999, as revised in the order dated March 19, 1999, and May 15, 2000, be and the same is hereby affirmed.

Costs taxed against the appellants.

ATTEST:
/s/ Marcia M. Waldron
Clerk

Dated: May 15, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

EVELYN GULLA,
Plaintiff,

V. Civil Action No. 96-1232

NORTH STRABANE TOWNSHIP and
NORMA WINTERMYER,
individually and
in her capacity as a North
Strabane Township Supervisor,
Defendants.

MEMORANDUM

LANCASTER, J.

This case, filed under the Civil Rights Act of 1871, 42 U.S.C. § 1983, is before us on remand from the Court of Appeals for the Third Circuit with a mandate to address plaintiff's constitutional claims on the merits. Gulla v. North Strabane Twp., 146 F.3d 168 (3d Cir. 1998) . Before the court are the parties' cross motions for summary judgment. For the reasons that follow, defendants' motion will be granted and plaintiff's denied.

I. Background

The parties are generally familiar with the background of this case. Plaintiff owns real property in North Strabane Township, Pennsylvania. In April of 1993, a developer applied to the Township for permission to subdivide and develop the land adjacent to plaintiff's property. In June of 1994, the Township's Board of Supervisors approved the developer's proposal. Plaintiff contends that the Township approved the proposal without providing adequate notice, as required under Pennsylvania law. Plaintiff further contends that the Township's failure to do so violates her right to due process of law. Finally, plaintiff alleges that Norma Wintermyer, one of the Township Supervisors who voted in favor of the plan, had an improper financial motive for doing so. Thus, plaintiff contends that the vote violated plaintiff's right to substantive due process of law.

II. Discussion

Plaintiff contends that she was denied procedural due process because the Township failed to provide her with adequate notice that it was going to consider and vote on the developer's plan at a public hearing. Plaintiff further contends that she was denied substantive due process because one of the voters had an improper financial motive for voting for the plan. Specifically, plaintiff contends that three Township Supervisors attended a meeting at which the plan was voted on.

All three voted in favor of the plan. Plaintiff contends, however, that Supervisor Wintermyer is a realtor by profession, and, that she was motivated to vote for the plan so that she could earn future commissions by promoting the sale of real estate lots in the plan. Plaintiff's constitutional claims are without merit.

First, whether addressing procedural or substantive due process, there is no abstract constitutional right to due process of law. See Olim v. Wakinekona, 461 U.S. 238, 250 (1983) ("Process is not an end in itself"); see also United States v. Jiles, 658 F.2d 194, 200 (3d Cir. 1981) (absent deprivation of life, liberty, or property, no independent federal due process right exists). Rather, the state may not deprive a citizen of life, liberty, or property without due process of law. In other words, process is not the substantive right: life, liberty, and property are the substantive rights, and no process is due unless the state deprives an individual of his life, liberty, or property. In this case, North Strabane Township did not deprive plaintiff of her property. The Township simply approved a plan to develop adjacent land.

Although somewhat unfocused, plaintiff's theory of recovery against the Township appears to be based on the presence on the adjacent property, of a spring that was connected by pipeline to plaintiff's property. Plaintiff contends that she had a right of way to draw water from the spring. When construction of the development began, however, the spring and pipeline were destroyed. Plaintiff contends that by approving the developer's plan, the Township deprived her of their

property interest in the spring. This theory is completely without merit.

The Township did not destroy the spring, the developer destroyed the spring. If plaintiff has any cause of action for the destruction of her property interest in the spring, it is a cause against the developer, in state court and under the common law of trespass or conversion. Plaintiff remains free to pursue such claims.[1] Because the Township has not deprived plaintiff of property, its actions have no due process implications. On that basis, defendants are entitled to summary judgment on both the procedural and substantive due process claims.

Moreover, even if the Township had deprived plaintiff of her property interest in the spring, we would reach a similar conclusion. Plaintiff's procedural due process claim of entitlement to prior notice is based upon a Pennsylvania statute that provides that a governing body may hold a public hearing, after notice, before acting on a subdivision or land development plan.[2]

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[1]See Memorandum Order of February 10, 1999, Doc. No. 43, in which the court dismissed the state law claims against defendants without prejudice.

[2]Because we decide this case on other grounds, we set aside the issue of whether there was a "public hearing" within the meaning of 53 P.S. § 10508(5) before the supervisors voted on the plan,

53 P.S. § 10508(5). Section 10508(5) is, however, a state law. The Supreme Court has long made clear that a state may misapply its own laws without necessarily implicating the Fourteenth Amendment. Screws v. United States, 325 U.S. 91, 108-09 (1995) ; see also Paul v. Davis, 424 U.S. 693, 700 (1976) . "Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." Beck v. Washington, 369 U.S. 541, 555 (1962).

Restated, a mere violation by local state officials of state land use laws is not a violation of the federal constitution. See Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1105 (8th Cir. 1992) (even "a bad-faith violation of state law [requiring public notice before enactment of zoning ordinances] remains only a violation of state law"); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) ("a violation of state [zoning] law is not a denial of due process"); Muckway v. Craft, 789 F.2d 517, 522-23 (7th Cir. 1986) (denial of right conferred by state zoning law does not infringe federal Constitution); Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985) (allegation

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thereby eliminating any requirement of notice. We note parenthetically that it is permissible, not mandatory, that a hearing be held prior to the approval of a land development plan. Eastern Consol. and Distrib. Services, Inc. v. Bd. of Comm'rs of Hampden Tp., 701 A.2d 621, 624 (Pa. Commw. 1997).

that state actor violated state law does not state section 1983 claim) ; Crocker v. Hakes, 616 F.2d 237, 239 n. 2 (5th Cir. 1980) (same); Fluent v. Salamanca Indian Lease Auth., 847 F.Supp. 1046, 1056 (W.D. N.Y. 1994) (same).

Moreover, a violation of procedural due process occurs only when a state fails to provide an adequate process to remedy errors or irregularities. See Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). Even if the state deprives one of property, which it has not done in this case, a plaintiff fails to state a constitutional claim if the state affords an adequate post-deprivation remedy. Paratt v. Taylor, 451 U.S. 527 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 328 (1986) see also Chiplin Enter., Inc. v. City of Lebanon, 712 F.2d 1524, 1528 ("A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error."); Bello v.Walker, 840 F. 2d 1124, 1127 (3d Cir. 1988) ("It is the law in this circuit that a state provides adequate due process when it provides reasonable remedies to rectify a legal error by a local administrative body'.").

Pennsylvania provides an adequate post-deprivation remedy for one who believes that local officials have violated state law in land use matters. Specifically, Pennsylvania statute permits an aggrieved party to appeal to the Court of Common Pleas of the county where the land is located. 53 P.S. § 11002-A. In addition, an aggrieved individual has the further right to

seek appellate review by the Commonwealth Court of Pennsylvania. 42 P.S. § 762(a)(4)(i)(A); 53 P.S. §§ 11001-A to 11006-A.

Thus, Pennsylvania provides a procedure whereby an aggrieved party is given a full and fair opportunity to be heard regarding any irregularities in the procedures and policies implemented by local officials on land use matters. Indeed, in this case plaintiff took full advantage of state procedures for challenging the Township's failure to provide notice of its action. See Gulla v. North Strabane Twp., 712 A.2d 281 (Pa. 1998) ; Gulla v. North Strabane Twp., 676 A. 2d 709 (Pa. Commw. Ct. 1996) ; Gulla v. North Strabane Twp., Washington Co. No. 94-3933. The fact that the state courts ruled against plaintiff does not mean that she was denied procedural due process; it simply means that plaintiff lost the case.

III. Conclusion

For the foregoing reasons, defendants' motion will be granted, and plaintiff's denied. An appropriate order follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

EVELYN GULLA,
Plaintiff,

V. Civil Action No. 96-1232

NORTH STRABANE TOWNSHIP and
NORMA WINTERMYER,
individually and
in her capacity as a North
Strabane Township Supervisor,
Defendants.

ORDER

AND NOW, this 12th day of May, 2000, upon consideration of the parties' cross motions for summary judgment, IT IS HEREBY ORDERED that defendants' motion [document #61, 62] is GRANTED. IT IS FURTHER ORDERED that plaintiff's motion [document #65] is DENIED.

BY THE COURT:

/s/ Gary L. Lancaster

cc: All Counsel of Record

[J-139 of 1997]

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

RONALD GULLA and EVELYN GULLA, :
Appellants, :
v. :
NORTH STRABANE TOWNSHIP and :
LINDENCREEK ASSOCIATES, :
Appellees :

No. 35 W.D. Appeal Dkt. 1997

Appeal from Order of Commonwealth Court entered April 9, 1996, at No. 2696 C.D. 1995, Affirming Order of Court of Common Pleas of Washington County, Civil Division, entered September 18, 1995, at No. 94-3933

676 A.2d 709 (Pa. Cmwlth. 1996)

Argued-. September 16, 1997

ORDER

PER CURIAM-. DECIDED: JULY 21, 1998

The Court being evenly divided, the Order of the Commonwealth Court is affirmed.

Mr. Justice Castille files a dissenting statement in which Madame Justice Newman joins.

Mr. Justice Nigro files a dissenting statement in which Madame Justice Newman joins.

Judgment Entered July 21, 1998,

/s/ Patricia Honard

CHIEF CLERK

[J-139-1997]

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

RONALD GULLA and EVELYN GULLA, :
Appellants, :
v: :
NORTH STRABANE TOWNSHIP and :
LINDENCREEK ASSOCIATES, :
Appellees :

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676 A.2d 709 (Pa. Cmwlth. 1996)

Argued-. September 16, 1997

DISSENTING STATEMENT

MR. JUSTICE CASTILLE DECIDED: JULY 21, 1998

I respectfully dissent from the per curiam order affirming the decision of the Commonwealth Court that appellants lacked standing to appeal the approval of a subdivision plan involving a parcel of property in which appellants have an interest, by virtue of a recorded easement, in spring water flowing on the property. Appellants claim that they were entitled to notice of the proposed subdivision in order to assert their rights, however, appellants received no notice of the subdivision proceedings.

The Commonwealth Court held that, pursuant to Michener Appeal, 382 Pa. 401, 115 A.2d 367 (1955), appellants had no right to assert a private interest in a zoning proceeding and, as a result, were not entitled to notice of the proceeding. The Commonwealth Court focused on the Michener court's statement that "[c]ourts in trying a zoning case will ordinarily exclude evidence of private restrictions, and in trying a private restriction case will exclude evidence of zoning. This is done on grounds of immateriality." Id. at 404, 115 A.2d at 370. Since this court's holding in Michener, courts of this Commonwealth have consistently interpreted that holding to exclude evidence of private restrictions in all zoning cases.

Michener is factually distinguishable from the instant case in that the parties before the court in that case were not the parties who possessed the private right sought to be enforced. The Michener court held that it was error for the trial court to consider deed restrictions in denying a zoning variance. The parties who possessed the right to enforce the deed restrictions were not parties to the action. Here appellants are the parties in interest seeking to enforce their own private right. In addition, Michener did not involve the issue of whether the adjacent landowner was entitled to notice of the zoning proceedings. Therefore, the Commonwealth Court's reliance on Michener is misplaced.

By failing to give appellant's notice of the subdivision proceedings, they were denied the right to object based upon the infringement of their water rights. Further, the failure to provide notice allowed appellants'

rights to be adversely affected without providing them with an opportunity to be heard. In this case, giving notice to appellants would have promoted judicial economy by disposing of both the proposed subdivision plan and the effect of the plan on appellants' water rights in a single proceeding which may have resulted in an accord being reached that accomplished appellees' purposes while maintaining appellants' rights. Because I believe that appellant's should have been given notice and the opportunity to present their objections in the zoning proceeding, I would reverse.

Madame Justice Newman joins this dissenting statement.

J-139-1997

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RONALD GULLA and EVELYN GULLA, :
Appellants, :
v. :
NORTH STRABANE TOWNSHIP and :
LINDENCREEK ASSOCIATES, :
Appellees :

No. 35 W.D. Appeal Dkt. 1997
Appeal from Order of Commonwealth Court entered April 9, 1996, at No. 2696 C.D. 1995, Affirming Order of Court of Common Pleas of Washington County, Civil Division, entered September 18, 1995, at No. 94-3933

676 A.2d 709 (Pa. Cmwlth. 1996)
Argued-. September 16, 1997

DISSENTING STATEMENT
MR. JUSTICE NIGRO **DECIDED: JULY 21,1998**

I respectfully dissent from the per curiam affirmance of the Commonwealth Court's decision. The Commonwealth Court held that Appellants have no standing to appeal the approval of a subdivision on property on which they assert that they have an interest in spring water. Former Justice Bell has aptly explained the practical effect of such a ruling:

> A Judge sifting in the Court of Common Pleas can grant a variance to a property owner in defiance and in violation of the building restriction on his lot or any other covenant running with the

> land. One day later the same Judge, sifting in the same chair and in the same courtroom will be compelled to grant an injunction sur a complaint by the owner of the dominant tenement to restrain the servient property owner from doing exactly what he authorized him to do one day before.

Appeal of Michener, 382 Pa. 401, 410, 115 A.2d 367, 372 (1955)(Bell, J., dissenting). Given this result, I would grant Appellants standing to object to the approval of the subdivision based upon their property interest. Conferring standing will allow all of the issues related to the proposed subdivision to be raised at once.

I recognize that a zoning board's expertise is limited to zoning matters and that it may be unable to dispose of all of the property issues raised. By allowing standing, however, the parties can establish a record of facts related to the property at issue. In addition, the parties may be able to settle their differences without further litigation. The trial court would then be presented with any remaining issues related to the property in one proceeding. Thus, in the interest of judicial economy, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

RONALD GULLA and EVELYN GULLA,
Plaintiffs,

V. Civil Action No. 96-1232

NORTH STRABANE TOWNSHIP, NORMA WINTERMYER, individually and in her capacity as a North Strabane Township Supervisor, ALAN A. AXELSON, M.D., LINDENCREEK ASSOCIATES, T.A. WARD CONSTRUCTORS, and ADVANCED BUILDING DEVELOPMENT,
Defendants.

MEMORANDUM

Gary L. Lancaster,
District Judge. February 10, 1999

This is an action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. It arises from North Strabane Township's approval of a subdivision plan submitted by developer Lindencreek Associates. Plaintiffs, Ronald Gulla and Evelyn Gulla, own land in North Strabane Township adjacent to the subdivision and allegedly have a right to take water from a spring on the subdivision property. Pursuant to the subdivision

plan, however, a road was constructed that interfered with plaintiffs' ability to draw water from the spring. Plaintiffs have brought this action under section 1983 alleging various constitutional violations against the following parties: North Strabane Township; township supervisor Norma Wintermyer individually and in her official capacity; Lindencreek Associates, the developer of the subdivision; Alan A. Axelson, who has an ownership interest in Lindencreek; and T.A. Ward Constructors and Advanced Building Development ("ABD"), building contractors involved in the construction of the subdivision. Plaintiffs have also asserted Pennsylvania common law claims of trespass and conversion against all defendants except North Strabane Township. Plaintiffs seek money damages and injunctive relief.

Before the court are defendants' motions to dismiss under Federal Rules of Civil Procedure 12 (b) (1) , (2) , and (6) [Documents 12, 15, 23, 24][1] . For the reasons that follow, all claims brought by plaintiff Ronald Gulla against all defendants are dismissed for lack of subject matter jurisdiction because he lacks standing. All of plaintiff Evelyn Gulla's section 1983 claims against Alan A. Axelson, M.D., Lindencreek Associates, T.A. Ward Constructors, and ABD, are dismissed because those defendants do not act under color of state law., Plaintiff Evelyn Gulla's section 1983 claims against the remaining defendants, North Strabane

[1] The court finds that there is no valid personal jurisdiction challenge in this case under Rule 12(b)(2) as to any defendant.

Township and Norma Wintermyer, based on denial of police protection, taking of her property without just compensation, and unreasonable seizure of property are dismissed for failure to state a claim for which relief may be granted. Her section 1983 claims against North Strabane Township and Norma Wintermyer, based on the alleged violation of her substantive and procedural due process rights remain. Finally, the court declines to exercise supplemental jurisdiction over any of plaintiff Evelyn Gulla's state law claims and dismisses them without prejudice.

I. BACKGROUND

Plaintiffs allege the following:

Plaintiffs own land located within North Strabane Township adjacent to a subdivision under development by defendant Lindencreek. On April 23, 1993, Lindencreek submitted an application for subdivision approval to North Strabane Township's Planning Commission. On June 28, 1994, the North Strabane Township Board of Supervisors approved the application by a 3-0 vote. Plaintiffs allege that they received no notice of the application until July 15, 1994, when a representative of Lindencreek contacted plaintiffs to inform them that the excavation work for the subdivision would interfere with plaintiffs' ability to draw water from the spring. on July 28, 1994, plaintiffs filed in the Court of Common Pleas of Washington County, Pennsylvania an appeal of the Board of Supervisors' decision approving the subdivision. On September 18, 1995, the Honorable Thomas D. Gladden issued an

opinion affirming the Board's decision and dismissing plaintiffs' appeal. The Commonwealth and Supreme Courts of Pennsylvania subsequently affirmed. Gulla v. North Strabane Township, Civil Division No. 94-3933 (Pa. Ct. C.P. of Washington County Sept. 18, 1995), aff'd, 676 A.2d 709 (Pa. Commw. 1996), aff'd, 712 A.2d 281 (Pa. 1998).

Plaintiffs filed this action on June 28, 1996. This court dismissed plaintiffs' case on the basis of the Rooker-Feldman doctrine. The Court of Appeals for the Third Circuit, however, reversed and held that neither the Rooker-Feldman doctrine, claim preclusion, or issue preclusion bar plaintiffs' current claim. Gulla v. North Strabane Township, 146 F.3d 168 (3d Cir. 1998). The court of appeals then remanded the case to this court for further proceedings.

II. STANDARDS OF REVIEW

When a court considers a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), it must first determine whether the defendant is making a facial or factual jurisdictional attack. This is a factual jurisdictional attack, because defendants argue that the court lacks jurisdiction based on evidence outside of the pleadings, specifically the deed granting rights in the spring to Joseph and Evelyn Gulla. See Memorandum of Law in Support of Defendants, Alan A. Axelson, M.D. and Lindencreek Associates' Motion to Dismiss Pursuant to Rule 12(b)(1)(2) and (6) [Document #26] (hereinafter "Axelson Memo"), Exhibit D. "Because at

issue in a factual 12(b) (1) motion is the trial court's [actual] jurisdiction -- its very power to hear the case -- [rather than simply the sufficiency of plaintiff's allegations] there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen v. First Fed. Savs. and Loan Assoc., 549 F.2d 884, 891 (3d Cir. 1977).

When the court considers a Rule 12(b)(6) motion to dismiss, the issue is not whether plaintiff will prevail in the end or whether recovery appears to be unlikely or even remote. The issue is limited to whether, when viewed in the light most favorable to plaintiff, and with all well-pleaded factual allegations taken as true, the complaint states any valid claim for relief. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994).

It is according to these standards that the court has reviewed defendants' motions. Based on the pleadings of record, the arguments of counsel, and the briefs filed in support and opposition thereto, the court is persuaded that plaintiff Ronald Gulla lacks standing and thus the court is without subject matter jurisdiction over his claims. Moreover, the court finds that plaintiffs can prove no set of facts in support of their section 1983 claims predicated on the denial of police protection in violation of the Due Process and Equal Protection Clauses, a taking of their property under the Fifth Amendment, and unreasonable seizure of property under the Fourth Amendment.

III. DISCUSSION

A. Standing of Plaintiff Ronald Gulla

Defendants Axelson and Lindencreek argue that plaintiff Ronald Gulla lacks standing and have moved to dismiss his claims for lack of subject matter jurisdiction under Rule 12(b)(1). Specifically, defendants Axelson and Lindencreek contend that while plaintiff Ronald Gulla's section 198i, trespass, and conversion claims derive from the alleged violation of his right to draw water from a spring on the subdivision property, he has no such right. Defendants Axelson and Lindencreek base this argument on the language of the deed granting Joseph and Evelyn Gulla rights in the spring, which states:

> It is expressly understood and agreed, that all rights, privileges, rights of way and easements herein given and granted unto the parties of the second part [Joseph and Evelyn Gulla shall cease and determine in the event the parties of the second part or the survivor of them shall cease to own said parcel.

Axelson Mem., Ex.D. Pursuant to this deed, defendants Axelson and Lindencreek argue that plaintiff Ronald Gulla has no right in the spring that could have been violated by defendants.

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." Lulan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Courts have long held that a party invoking a federal court's jurisdiction bears the burden of demonstrating standing by establishing (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. Id. at 560-61. An "injury in fact" means an invasion of a legally protected interest that is " (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 560 (citations, footnote, and internal quotation marks omitted). The court agrees with defendants Axelson and Lindencreek that plaintiff Ronald Gulla cannot meet his burden of establishing an injury in fact -- he has no legally protectible interest in the spring. The deed's language clearly indicates that the right in the spring is personal to Evelyn and Joseph Gulla, as it terminates when they cease to own the parcel of land. Accordingly, Ronald Gulla's federal and state claims are dismissed for lack of subject matter jurisdiction.

B . Plaintiff Evelyn Gulla's Section 1983 Claims[2]

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[2]Defendants North Strabane and Wintermyer appear to argue that they are immune from plaintiff's section 1983 claim under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. §§ 8541-8564. This argument is without merit. See Wade v. City of Pittsburgh, 765 F.2d 405, 407 (3d Cir. 1985) ("The supremacy clause of the Constitution prevents a state from

I. Plaintiff Evelyn Gulla's Section 1983 Claims Against Defendant Developers and Contractors

In order to recover in a section 1983 action, plaintiff must prove two essential elements: 1) defendant deprived her of a right secured by the Constitution and laws of the United States; and 2) defendant deprived her of that federal right under color of state law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). If plaintiff does not show that defendant acted under state law, the section 1983 claim fails for lack of subject matter jurisdiction, and there is no need to determine whether a federal right was abridged. See Polk County v. Dodson, 454 U.S. 312, 315 (1981); see also Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

Defendants Axelson, Lindencreek, T. A. Ward, and ABD, the developers and contractors for the subdivision development, have moved to dismiss plaintiff's section 1983 claims against them on the grounds that the complaint fails to allege sufficient facts to support even an inference that they acted under color of state law. The complaint states, in relevant part:

> Defendants Axelson and Lindencreek have acted in concert with and/or in agreement

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immunizing entities or individuals alleged to have violated federal law.").

> with the North Strabane Township officials regarding the subdivision process and the ultimate marketing of the lots in the subdivision. Defendant contractors are acting under the instruction and direction of Defendants Axelson and Lindencreek, and in accord with the plan approved by the municipal defendant.

Complaint, ¶19.

Upon review of the complaint as a whole, the court finds that it fails to meet the pleading requirements of Rule B(a)(2) as to plaintiff's section 1983 claims against the developer and contractor defendants.[3] Plaintiff fails to allege facts to demonstrate that defendants Axelson and Lindencreek did anything more than invoke the township's subdivision approval process. Merely invoking state procedures, such as applying for approval of a subdivision, does not establish an inter-relation with the government

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[3]Federal Rule of Civil Procedure 8 (a) (2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Notice pleading applies to all claims under section 1983. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993). But see, e.g., GRJ Invs., Inc. v. County of Escambia, Fl., 132 F.3d 1359, 1368 (llth Cir. 1998) (holding that Leatherman's abrogation of heightened specificity requirement in section 1983 claims against municipalities did not extend to section 1983 claims against individual government officials).

sufficient to cloak one as acting under color of law. See, e.g., Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982). Moreover, plaintiff fails to allege that defendants T.A. Ward and ABD were involved in the subdivision approval process in any way. Accordingly, all of the section 1983 claims against defendants Axelson, Lindencreek, T.A. Ward, and ABD will be dismissed.

2. Plaintiff Evelyn Gulla's Procedural and Substantive Due Process Claims Against North Strabane Township and Norma Wintermyer

a. Procedural Due Process - Notice

As to the section 1983 claims against the remaining defendants, North Strabane Township and Norma Wintermyer, plaintiff alleges that defendants "[a]pproved a plan destroying personal property rights without notice" in violation of her due process rights. Complaint, ¶ 20(a)(1). Pennsylvania law provides that "[b]efore acting on any subdivision plan, the governing body or the planning agency, as the case may be, may hold a public hearing thereon after public notice.[4] 53 Pa. Cons. Stat. § 10508. Thus, if the township held a hearing on the matter, it was statutorily obligated to provide notice of the Plaintiff alleges that a hearing was

[4]Public notice is generally defined as "notice published once eac week for two successive weeks in a newspaper of general circulation in the municipality." 53 Pa. Cons. Stat. § 10107.

held and that no notice was given. If true, this may state a cause of action under section 1983 for denial of procedural due process and, thus, the court is not persuaded "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle to him to relief."[5] Conley v. Gibson, 355 U. S. 41, , 45-46 (1957) . The issue then becomes what notice was due and whether the township complied. This issue can be addressed at summary judgment stage upon a properly developed record.

b. Substantive Due Process - Improper Motive

Plaintiff also claims that her procedural due process rights were violated when the township approved the subdivision plan "pursuant to a procedure tainted with conflict of interest and/or lack of neutrality", Complaint, ¶ 20(a)(1), and "[a]rbitrarily, capriciously, without a rational basis, and/or with a

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[5] The court notes, however, that there is substantial authority for the proposition that an individual's interest in a state's procedural device is not entitled to due process protection. See, e.g., Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644, 648 (D.C. Cir. 1987) ("[T]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive liberty interests entitled to federal constitutional protection under the Due Process Clause") (citations omitted) We leave this complex issue for another day.

wrongful motive for personal profit not related to legitimate governmental objectives, authorized the destruction of plaintiffs' property rights. . ." Complaint ¶ 20(b). Specifically, plaintiff claims that defendant Wintermyer, who is both a township supervisor and a real estate agent marketing the lots in the subdivision, approved the subdivision plan for her personal benefit. Complaint, ¶ 16.

A cause of action for violation of one's substantive due process rights exists where a zoning hearing board member makes a zoning decision based on "personal reasons unrelated to the merits" of the zoning issue. Bello v. Walker, 840 F.2d 1124, 1129-30 (3d Cir. 1988); accord DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell, 53 F.3d 592, 601 (3d Cir. 1995). Accordingly, plaintiff's assertion that the zoning decision was made based on defendant Wintermyer's personal reasons states a cause of action for violation of plaintiff's substantive due process rights.

Defendants North Strabane Township and Norma Wintermyer motions to dismiss plaintiff's substantive and procedural due process claims are denied. As to plaintiff's other claims under section 1983, however, the court finds that plaintiff fails to state a claim for which relief may be granted. These claims are discussed in turn below.

3. Plaintiff's Denial of Police Protection Claim Against North Strabane Township and Norma Wintermyer

Plaintiff alleges that defendants "[selectively denied to plaintiffs, police protection through failing to enforce trespass laws in violation of the Equal Protection and/or Due Process Clauses of the United States Constitution." Complaint, ¶22(c). Inexplicably, plaintiff named all defendants, yet, such a claim can only be raised against a party having a police department -- North Strabane Township. This is the only portion of the Complaint where the alleged denial of police protection is mentioned. Furthermore, even if plaintiff had alleged facts sufficient to state a claim for denial of police protection, there is no substantive due process right to police protection as a matter of law. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). Moreover, plaintiff does not aver that she belongs to any class that is treated differently by defendants as to the level of police protection that she receives. Accordingly, plaintiff has failed to state a claim for denial of police protection under the Due Process and Equal Protection Clauses.

4. Plaintiff's Fifth Amendment Takings Claim Against North Strabane Township and Norma Wintermyer

Plaintiff alleges that defendants' approval of the subdivision plan was a "[t]aking [of] plaintiffs' property without payment of just compensation contrary to the Fifth Amendment of thw [sic] United States Constitution." Complaint ¶ 20(d). Defendants North Strabane and Wintermyer have moved to dismiss this claim because plaintiffs did not use Pennsylvania's

procedure for obtaining just compensation for takings. The court agrees.

The United States Supreme Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985). Moreover, Pennsylvania district courts have dismissed Fifth Amendment takings claims under section 1983 where the plaintiff had not sought just compensation under Pennsylvania's inverse condemnation law. Baranowski v. Borough of Palmyra, 868 F. Supp 86, 88 (M.D. Pa. 1994); Edelweiss Dev. Corp. v. County Susquehanna, 738 F. Supp. 879, 884 (M.D. Pa. 1988), aff'd, 908 F.2d 962 (3d Cir. 1990). In this case, plaintiff did not employ Pennsylvania's inverse condemnation law, 26 Pa. Cons. Stat. § 1-303, to seek Compensation for the alleged taking. See Brief in Opposition to Motion to Dismiss of Defendants North Strabane Township and Norma Wintermyer [Document #22], at 14 (stating that plaintiffs did not bring condemnation proceedings for the alleged taking of their property rights). Pursuant to Williamson, the court finds that Plaintiff's takings claim under section 1983 is not ripe and therefore, should be dismissed.[6]

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[6]Although defendants moved to dismiss this claim under Rule 12(b)(6), the court notes that the claim is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

5. Plaintiff's Unreasonable Seizure of Property Claim Against North Strabane Township and Norma Wintermyer

Plaintiff asserts that defendants' approval of the subdivision plan worked an "[u] nreasonable seizure of [plaintiffs'] property contrary to the Fourteenth Amendment of the United States Constitution." Complaint, ¶ 20(e). The court finds that the Fourth Amendment is inapplicable in this case because North Strabane Township did not seize any property, nor is this a criminal case or one involving a civil forfeiture. North Strabane Township's approval of the subdivision plan does not implicate the protections of the Fourth Amendment. See generally Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975) (noting that the Fourth Amendment "was tailored explicitly for the criminal justice system").

C. Supplemental Jurisdiction Over Plaintiff's State Claims

Plaintiff has also asserted Pennsylvania common law tort claims of conversion and trespass against defendants. The court must, therefore, consider whether it should entertain the state law claims under the doctrine of supplemental jurisdiction. 28 U.S.C. § 1367. Whether the court will exercise supplemental jurisdiction is within its discretion. See Growth Horizons, Inc v. Delaware County, Pa., 983 F.2d 1277, 1284 (3d Cir. 1993). The court declines to exercise supplemental jurisdiction because it has dismissed the federal claims

against four of the five defendants charged with trespass and conversion. Accordingly, plaintiff Evelyn Gulla's state law claims are dismissed without prejudice.

IV. CONCLUSION

All claims brought by plaintiff Ronald Gulla against all defendants are dismissed for lack of subject matter jurisdiction because he lacks standing. Plaintiff Evelyn Gulla's section 1983 claims against Alan A. Axelson, M.D., Lindencreek Associates, T.A. Ward Constructors, and ABD are dismissed because those defendants do not act under color of state law. All of plaintiff Evelyn Gulla's section 1983 claims against the remaining defendants, North Strabane Township and Normas Wintermyer, based on denial of police protection, taking of her property without just compensation, and unreasonable seizure of property are dismissed for failure to state a claim for which relief may be granted. Her 1983 claim against the remaining defendants, North Strabane Township and Norma Wintermyer, based on the alleged violation of her substantive and procedural due process rights remain. The court declines to exercise supplemental jurisdiction over any of plaintiff Evelyn Gulla's state law claims and dismisses them without prejudice. The appropriate order follows.

BY THE COURT:
/s/ Gary L. Lancaster, J.

Dated: February 10, 1999
cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

RONALD GULLA and EVELYN GULLA,
Plaintiffs,

V. Civil Action No. 96-1232

NORTH STRABANE TOWNSHIP, NORMA WINTERMYER, individually and in her capacity as a North Strabane Township Supervisor, ALAN A. AXELSON, M.D., LINDENCREEK ASSOCIATES, T.A. WARD CONSTRUCTORS, and ADVANCED BUILDING DEVELOPMENT,
Defendants.

ORDER

AND NOW, this 10th day of February, 1999, upon consideration of Defendants Alan A. Axelson, M.D. and Lindencreek Associates' Motion to Dismiss Pursuant to Rule 12 (b) (1) (2) and (6) (Document #23], Defendant Advanced Building Development's Motion to Dismiss Pursuant to F. R. Civ. P. 12 (b) (6) , 12 (b) (1) and 12(b) (2) [Document #12], Defendant T.A. Ward Constructors' Motion to Dismiss Complaint [Document #24], and Defendants North Strabane Township and Norma Wintermyer's Motion to Dismiss Pursuant to F. R. C. P. 12 (b) (6) [Document #15], IT IS HEREBY ORDERED that the motions are GRANTED IN PART and DENIED IN PART as follows:

(1) defendants' motions to dismiss are GRANTED as to all of plaintiff Ronald Gulla's state and federal claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1);

(2) defendants' motions to dismiss are GRANTED as to Plaintiff Evelyn Gulla's section 1983 claims based on denial of police protection in violation of the Equal Protection and Due Process Clauses (Complaint, ¶ 20(c)), the taking of plaintiff's property without just compensation in violation of the Fifth Amendment (Complaint, ¶ 20(d)), and unreasonable seizure of property in violation of the Fourth and Fourteenth Amendments (Complaint, ¶ 20(e))

(3) defendants' motions to dismiss are DENIED as to Plaintiff Evelyn Gulla's section 1983 claims based on violations of her procedural and substantive due process rights (Complaint ¶¶ 20(a)(l)-(2), 20(b)) without prejudice to defendants to raise these issues again on a properly developed record pursuant to Federal Rule of Civil Procedure 56; and

(4) defendants' motions to dismiss as to all of plaintiff Evelyn Gulla's state law claims are GRANTED without prejudice to plaintiff's rights to re-file them in state court.

BY THE COURT:

/s/ Gary L. Lancaster, J.

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

RONALD GULLA and EVELYN GULLA,

Plaintiff,

V. No. 96 -1232

NORTH STRABANE TOWNSHIP; NORMA WINTERMYER, individually and in her capacity as a North Strabane Township Supervisor; ALAN AXELSON, M.D.; LINDENCREEK ASSOCIATES; T.A. WARD CONSTRUCTORS; and ADVANCED BUILDING DEVELOPMENT,

Defendants. JURY TRIAL DEMANDED

COMPLAINT

AND NOW come Plaintiffs Ronald Gulla and Evelyn Gulla, by and through their counsel, Peter M. Suwak, Esquire, who files the following Complaint, based upon the following:

INTRODUCTION

1. Plaintiffs Ronald Gulla and Evelyn Gulla are adult individuals and the owners of a certain parcel of land located within North Strabane Township; directly

adjacent to a proposed subdivision submitted by Lindencreek Associates.

2. Defendant North Strabane Township is a duly organized municipal body, a township of the second class, located within Washington County, Pennsylvania, with offices located as 1929 Route 519, Canonsburg PA 15317.

3. Defendant Norma Wintermyer is an adult individual who was, at all times material hereto, one of the duly elected supervisors of North Strabane Township, with offices located at 1929 Route 519, Canonsburg PA 15317.

4. Defendant Alan A. Axelson, M.D., is an adult individual with business address at 90 W. Chestnut Street, Washington PA 15301.

5. Defendant Lindencreek Associates is a purported real estate partnership located at Lindencreek Road, Canonsburg PA 15317.

6. Defendant T. A. Ward Constructors is a Pennsylvania construction business located at 1405 McLaughlin Run Road, Pittsburgh PA 15241. Defendant Advanced Building Development is a Pennsylvania construction business located at 141 Valley View Drive, Library PA 15129.

STATEMENT OF FACTS

7. On or about April 23, 1993, Lindencreek Associates submitted an application to the Planning

Commission for subdivision approval. The application purports to seek both preliminary approval and final approval for recording. A true and correct copy of the application is attached hereto as Exhibit A.

8. No notice was ever given to the Gullas concerning the subdivision process. No notice was given despite the fact that the Gullas had complained to representatives of Lindencreek that their spring water right-of-way had been interfered with on the land which now appears to be included in the subdivision proposal.

9. On or about July 15, 1994, a representative of Lindencreek contacted Gulla's counsel to warn of anticipated interference with Gulla's spring water right-of-way. This was the first notice to the Gullas of any subdivision approval.

10. Subsequently, the Gulla's obtained a copy of the subdivision plan from the Township. A copy of a portion of the plan is attached hereto as Exhibit B. It appears that the Gulla spring and right-of-way is to be asphalted over with a road and/or other improvements.

11. The Gullas also discovered that the Board of Supervisors for North Strabane Township approved the Lindenview subdivision plan by a vote of 3-0 on June 28, 1994. A copy of the minutes of this vote is attached hereto as Exhibit C. It is noted that Defendant Supervisor Wintermyer voted to grant the subdivision.

12. The Gulla's ownership interest in the spring and right-of-way scheduled to be asphalted over in order

to accommodate a major street for the real estate development is a matter of record. A copy of the deed granting the easement is attached hereto as Exhibit D.

13. On or about July 28, 1994 Defendant contractors began excavation operations pursuant to the subdivision plan approval which totally destroyed and buried the Gulla spring. Additionally, the right of way established by means of a pipeline leading to the Gulla property was also destroyed. This resulted in the termination of the sole water supply to the Gulla residence. Despite demand, Defendants have refused to restore the spring and water line.

14. The destruction of the Gulla spring and waterway is the culmination of a series of malicious acts aimed at the Gulla family. This history includes the following:

a. Defendant Axelson through companies he owned and/or controlled procured the land for development from farmland controlled by the Gulla family. Defendant Axelson through companies he owned and/or controlled procured the land over the objection of Plaintiff Ronald Gulla who had an approved loan and had offered to pay a higher price for the ground.

b. Near the time of the scheduled audit of the Estate of Anna Gulla, No. 63-75-968 to review objections to the above-mentioned estate proceedings, Defendant Axelson, a psychiatrist, initiated proceedings for the involuntary

commitment of Joseph Gulla (husband of Plaintiff Evelyn Gulla and father of Plaintiff Ronald Gulla) to a mental institution requiring extensive proceedings to end the commitment.

c. Defendant Axelson also initiated criminal charges against Joseph Gulla which were eventually non prossed by the District Attorney of Washington County.

15. Defendants Axelson and Lindencreek had specific knowledge regarding the Gulla's spring and pipeline right-of-way. In approximately December 1993, preliminary excavation work broke the water line. The intervention of counsel forced a repair of the same. It is noted that the repair was inadequate in that old and used pipes were utilized as replacements which served to begin to taint the water.

16. Following the vote by the North Strabane Township supervisors it has been learned that Defendant Wintermyer, apparently acting on behalf of realtor Remax, is advertising and promoting the sale of the real estate lots in the subdivision plan.

COUNT I - CIVIL RIGHTS VIOLATIONS
(v. all defendants)

17. The averments of Paragraphs 1 through 16 are hereby incorporated as though fully set forth at length.

18. Defendants North Strabane Township and Norma Wintermyer, as a public official, acted under color of state law in approving the subdivision plan through the procedures of the municipal corporation.

19. Defendants Axelson and Lindencreek have acted in concert with and/or in agreement with the North Strabane Township officials regarding the subdivision process and the ultimate marketing of the lots in the subdivision. Defendant contractors are acting under the instruction and direction of Defendants Axelson and Lindencreek, and in accord with the plan approved by the municipal defendant.

20. As a result of the aforementioned conduct, which was done knowingly, intentionally, maliciously, recklessly, or alternatively, negligently, defendants have violated the civil rights of the plaintiffs as follows:

a. Adversely affected plaintiffs' property rights without due process of law in violation of the Due Process Clause of the United States Constitution:

1) Approved a plan destroying personal property rights without notice.

2) Approved a plan pursuant to a procedure tainted with conflict of interest and/or lack of neutrality.

b. Arbitrarily, capriciously, without a rational basis, and/or with a wrongful motive for

personal profit not related to legitimate governmental objectives, authorized the destruction of plaintiffs' property rights contrary to the Due Process Clause of the United States Constitution.

c. Selectively denied to plaintiffs, police protection through failing to enforce trespass laws in violation of the Equal Protection and/or Due Process Clauses of the United States Constitution.

d. Taking plaintiffs property without payment of just compensation contrary to the Fifth Amendment of the United States Constitution.

e. Unreasonable seizure of property contrary to the Fourteenth Amendment of the United States Constitution.

21. As a result of the foregoing, plaintiffs have been damaged as follows:

a. Loss of value of a fresh water spring supplying water needs to the residence;

b. Expenses associated with the establishment of replacement water on both a temporary and permanent basis;

c. Pain, suffering, inconvenience and loss of enjoyment of life, as a result of the aforementioned conduct;

d. The intentional, malicious and/or reckless conduct of the defendants previously outlined rises to the level of outrageous conduct, justifying the imposition of punitive damages in an amount to be determined at trial;

e. Entitlement to counsel fees and costs for the instant action per 42 U.S.C. §1988;

f. Declaration establishing the existence of the plaintiffs' legal right to their spring and easement;

g. Direct the reestablishment of plaintiffs' spring water at the level and conditions that existed prior to defendants' wrongful acts;

22. This conduct is actionable pursuant to 42 U.S.C. §1983.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT II - TRESPASS (STATE TORT)
(v. Defendants Wintermyer, Axelson, Lindencreek, T.A. Ward and Advanced Building Development)

23. The averments of Paragraphs 1 through 22 are hereby incorporated as though fully set forth at length.

24. The facts previously outlined constitute the state tort of trespass. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

25. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 21.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT III - CONVERSION

(v. Defendants Wintermyer, Axelson, Lindencreek, T.A. Ward and Advanced Building Development)

26. The averments of Paragraphs 1 through 25 are hereby incorporated as though fully set forth at length.

27. The facts previously outlined constitute the state tort of conversion. The Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

28. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 21.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

Respectfully submitted,

Date: 6/28/96 By: /s/ Dale M. Brown
PA ID $55828
Peter M. Suwak, Esquire
Counsel for Plaintiff
PA ID #23779
Pete's Surplus Building
P.O. Box 1
Washington, PA 15301
(412) 228-4885

VERIFICATION

Under the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities, I verify that the facts set forth in the foregoing Complaint are true and correct to the best of my information, knowledge and belief.

Dated: June 28, 1996 /s/ Ronald J. Gulla

NORTH STRABANE TOWNSHIP
WASHINGTON COUNTY, PENNSYLVANIA

PLANNING COMMISSION APPLICATION FOR SUBDIVISION APPROVAL

PLAN NAME Lindencrest Plan of Lots

LOCATION (Street Address) Lindencrest Road

BLOCK & LOT NUMBER _____ ZONING R-2

LANDOWNER Lindencrest Associates PHONE 746-2400

ADDRESS Lindencrest Road

DEVELOPER Lindencrest Associates PHONE 746-2400

ADDRESS Lindencrest Road

ENGINEER OR SURVEYOR Walter T. Scott, Jr.

Preliminary Approval ✓ Final Approval for Recording ✓

REQUIREMENTS ON DRAWING:	ENCLOSED	PENDING	NOT REQUIRED
SITE PLAN	✓		
SITE LOCATION	✓		
BUILDING LINES	✓		
SURROUNDING PROPERTY OWNERS	✓		
EXISTING ROADS	✓		
PROPOSED PUBLIC OR PRIVATE ROADS	✓		
EXISTING STRUCTURES	✓		
APPROVALS NEEDED:			
WASH COUNTY PLANNING COMMISSION			
DER			

TOTAL ACREAGE 18.78 AC MINIMUM LOT SIZE 12,263 (Sq. Ft)

NUMBER OF LOTS 22 MINIMUM LOT FRONTAGE 76'

LINEAR FEET OF NEW STREETS _____

Applicant's Signature

100 Lightning Oak Dr.
Address

412-941-3313
Phone

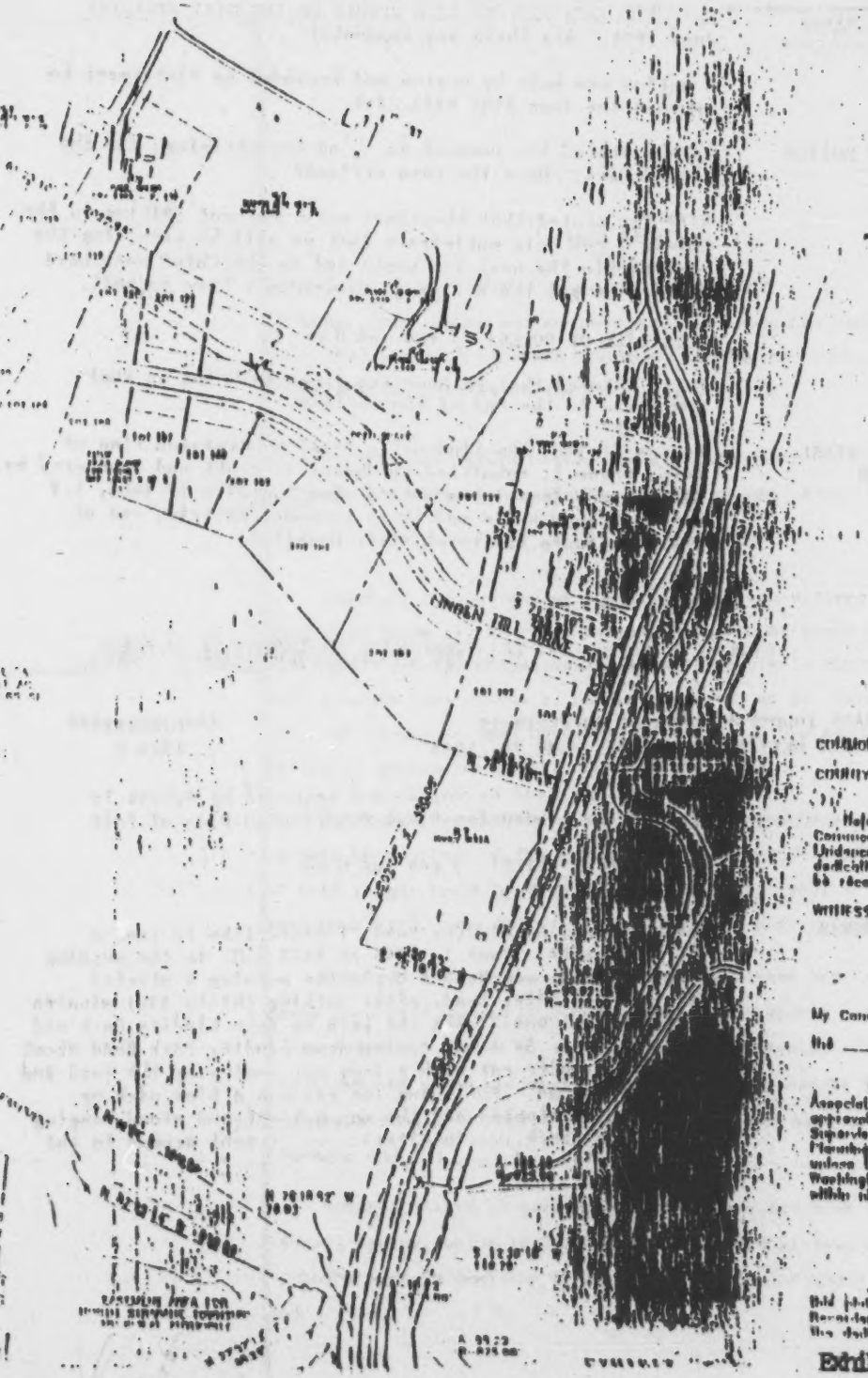
APPLICATION, FEE, AND PLANS MUST BE SUBMITTED TO THE TOWNSHIP OFFICE NO LATER THAN 10 DAYS BEFORE THE MEETING.

Fee Attached and Receipt/Check Number

NOTE: Professional services for review of application are charged separately at actual cost, e.g. Township Engineer, Township Solicitor, Fire Consultant etc., in accordance with the Township Subdivision Ordinance.

PLAN PAID 11/23/83 $330.00

"Ex A"



same-heirs and
successors and
of Washington
successors and
arise from the
physical grading
any slopes
to such
blasting upon
administrators and

IN WITNESS W

this _____ day

ATTEST:

We, the Undercreek A
do hereby certify
Undercreek Associa
54, and Deed Bo

COMMONWEALTH OF PENNSYLV

COUNTY OF WASHINGTON

Before me, the subscrib
Commonwealth and County, pe
Undercreek Associates, and a
dedication and plat to be th
be recorded as such.

WITNESS MY HAND AND NOTARI

My Commission Expires

this _____ day of _____

The foregoing dedication
Associates, with the full
approval of the Washington
Supervisors of North Strabane
Planning Commission, is hereby
unless this plat is recorded
Washington County, County Of
within ninety (90) days of date

this plat is hereby certified
Recorder of Deeds Office of
the dedication and covenants as

Exhibit "B"

BEST AVAILABLE COPY

OUTSTANDING BILLS — [illegible] June 1994. Are there any comments?

MOTION — A motion was made by Guyton and seconded by Winternyer to approve the June 1994 Bill List.

COMMENTS ON MOTION — Spicer stated his comment to [illegible] on the striping for the failed cats. Have the cats arrived?

Sifferlen stated that they have not. Without talking to the Chief, I can only anticipate that we will be receiving the cats within the next two weeks and so the Chief must have decided to get the striping so we don't have to wait.

ROLL CALL OF VOTES: 3 yes and 0 no 1,

Spicer stated that we have two items to bring up that was moved to the end of the meeting.

LINDENVIEW FINAL SUBDIVISION — Approve/reject the Lindenview Final Subdivision Plan of Lots, Phase I, submitted by Walter T. Scott and sponsored by Lindencreek Associates. Said plan includes 22 lots, 1.9 acres of open space and three residual parcels, one of which includes the Psychiatric Hospital.

[illegible]

MOTION — A motion was made by Guyton and seconded by Spicer to approve the Lindenview Final Subdivision Plan of Lots.

ROLL CALL OF VOTES: 3 yes and 0 no

PUBLIC COMMENTS — Frank Pintar, 66 Lindley Road, I would like to read a letter I wrote. June 1, 1994 at 8:45 A.M. In the morning this happened. At 8:00 A.M. in the morning I started walking on Lindley Road, after walking thirty (30) minutes I said that I would make one path up into Lindley Park and then go home. As I was coming down Lindley Park Road about to exit, a white cat with a lady was coming up the road and she waved at me. Following the cat was a blue pick-up truck, which stopped and the man got out and stood hanging out of the truck.....(Unclear)..... I went around to the [illegible]

EXHIBIT "C" Exhibit "C"

THIS DEED

MADE this 9 2nd day of April, 1961

BETWEEN FAIR. GURLA and ANNIE GURLA, also known as ANNA GURLA, his wife, of North Strabane Township, Washington County, Pennsylvania, parties of the first part,

AND

JOSEPH GURLA and EVELYN GURLA, his wife, of North Strabane Township, Washington County, Pennsylvania, parties of the second part.

W-I-T-N-E-S-S-E-T-H:

WHEREAS, the parties of the first part own a larger tract of land containing 117.82 acres situate in North Strabane Township, Washington County, Pennsylvania, more particularly described in a deed to them from Cephas F. Cochran, single, et al, dated March 28, 1939, of record in Deed Book 627, page 212, in the Recorder's Office of Washington County, Pennsylvania; and

WHEREAS, the parties of the first part have heretofore conveyed unto the parties of the second part a parcel of 1.688 acres out of said larger tract by deed dated November 1, 1961, of record in Deed Book 1118, page 392, in said Recorder's Office; and

WHEREAS, the parties of the second part have erected a dwelling house upon said parcel of 1.688 acres, and presently occupy the same, and which parcel of land and any improvements, structures, plantings and other property thereon and the occupants thereof require a supply or source of water for the use and enjoyment thereof; and

WHEREAS, there is located on said larger tract of land a certain spring, which is located 490 feet more or less northwest of the aforesaid dwelling house of the parties of the second part; and

Ex "D"

EXHIBIT "D"

WHEREAS, the parties of the first part herein have agreed to give and grant unto the parties of the second part herein certain rights in and to said spring and in and to the supply of water therefrom, together with the other appurtenant rights and interests hereinafter more particularly set forth, subject, however, to the conditions hereinafter set forth;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that Paul Gulla and Annie Gulla, a/k/a Anna Gulla, his wife, in consideration of the sum of One Dollar, unto them in hand paid by the parties of the second part herein, the receipt whereof is hereby acknowledged, do give and grant unto Joseph Gulla and Evelyn Gulla, his wife, the right, use and privilege to draw and use water from the aforesaid spring for the use and enjoyment of said parcel of 1.688 acres and any improvement, structure, planting and other property thereon and for the use of the occupants thereof, for so long as the parties of the second part or either of them own the aforesaid parcel of 1.688 acres described in the instrument of record in Deed Book 1110, page 392, aforesaid. Together with such rights, rights of way and easements necessary or convenient for the parties of the second part in entering into, and going upon, said larger tract of the parties of the first part at such places necessary or convenient for the purposes herein stated, with men and machinery, vehicles and materials at any and all times for the purpose of installing, laying, operating, maintaining, inspecting, removing, repairing, replacing, relaying and adding to from time to time pipe or pipes with necessary fittings, appurtenances and facilities for drawing water from said spring and for piping and transmitting it over said larger tract of the parties of the first part from said spring to the aforesaid parcel of 1.688 acres; together, also, with the express right, right of way and easement to install, maintain, repair and replace from time to time such basins, reservoirs, and other structures, devices and equipment necessary or convenient for the purpose of collecting, storing and retaining water from said

spring at or near said spring in connection with the use and enjoyment of the rights, privileges and easements herein given and granted.

It is, further, expressly understood and agreed that no limitation is hereby placed or imposed upon the diameter or size of any pipe, basin, reservoir, device, structure, equipment, fixtures or appurtenances used by the parties of the second part in connection with the easements and rights herein given and granted.

This grant is made, however, expressly under and subject to a certain agreement pertaining to water from a spring dated March 23, 1909, of record in Deed Book 470, page 269.

It is expressly understood and agreed, that all rights, privileges, rights of way and easements herein given and granted unto the parties of the second part shall cease and determine in the event the parties of the second part or the survivor of them shall cease to own said parcel of 1.600 acres; and no act or declaration of any sort shall be required of the parties of the first part, their heirs and assigns, to effect such termination.

UNDER AND SUBJECT to any exceptions, reservations, rights of way mentioned, contained or referred to in prior instruments of record.

JOSEPH GULLA, one of the parties of the second part herein, is the son of the parties of the first part herein.

NOTICE: THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR [illegible] THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED [illegible] HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL, AND IN THAT CONNECTION DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR OTHER STRUCTURE ON OR IN SUCH LAND. (This notice is set forth in the manner provided in Section 1 of the Act of July 17, 1961, P. L. 606.)

WITNESS the hands and seals of the parties of the first part the day and year first above written.

Witness:

Paul Gulla (SEAL.)

Annie Gulla, a/k/a (SEAL.)

Anna Gulla (SEAL.)

BOOK 1150 PAGE 410

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF WASHINGTON } ss:

On this the 23rd day of April, A. D. 1963, before me, a Notary Public, the undersigned officer, personally appeared PAUL OULLA and ANNIE OULLA, also known as ANNA OULLA, his wife, known to me (or satisfactorily proven) to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public
(TITLE OF OFFICER)

My commission expires

BEST AVAILABLE COPY